UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 8

BABCOCK AND WILCOX NUCLEAR OPERATIONS GROUP, INC.	)	**CASE NO. 08-CA-138022**
and	)	
INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIPBUILDERS, BLACKSMITHS, FORGERS AND HELPERS, LOCAL #900	)	**RESPONDENT'S REPLY TO THE REPLY OF THE GENERAL COUNSEL IN OPPOSITION TO RESPONDENT'S MOTION TO DISMISS THE COMPLAINT AND NOTICE TO SHOW CAUSE**

The Reply of the General Counsel in Opposition to Respondent's Motion to Dismiss the Complaint and Notice to Show Cause ("Response") makes several new arguments against deferral, arguments that the General Counsel neither raised in the Region's pre-Complaint deferral decision nor in the Reply Brief in Opposition to the Motion.[1] For the most part, B&W adequately covers these arguments in its Motion to Dismiss, its Reply, and its Brief in Response to the Board's March 12, 2015 Notice to Show Cause.

One new argument, however, is sufficiently distinct that it compels B&W to address it separately. Specifically, the General Counsel argues, for the first time, that the case is inappropriate for deferral based on the fourth *Collyer* deferral factor, *i.e.,* that the

[1]On Page 4, for instance, the General Counsel argues that this case is not deferrable because of B&W's denial that it violated the NLRA—in particular, because it denies that its actions constitute "discipline." However, the Complaint clearly alleges that B&W's conduct constitutes unlawful discipline, and for purposes of this Motion only, B&W assumes that these allegations are true. *See* B&W's Brief in Response to Notice to Board's March 12, 2015 Notice to Show Cause, at fn.4. It is, of course, these allegations that determine the appropriateness of deferral—not, as the Counsel suggests, a respondent's position on the merits. *See L.E. Meyers Company*, 270 NLRB No. 146 (May 31, 1984)(Whether deferral is appropriate is a threshold question which must be decided in the negative before the merits of the unfair labor practice allegations can be considered."). Any other rule would essentially require an admission to the allegations (and, potentially, an admission to liability) as a precondition to deferral. This would be absurd. Accordingly, this argument is baseless.

Agreement's arbitration clause does not "clearly encompass the dispute at issue." *See* Response at 4-5. Indeed, while this is a new argument, it fails for exactly the same reason as the General Counsel's previous argument (that the allegations involve animosity to employees' Section 7 rights): it contradicts settled Board precedent.

"Contrary to the General Counsel's argument...the presence of language expressly empowering an arbitrator to resolve [the specific unfair labor practice issue[] is not always a prerequisite to deferral." *E. I. Dupont De Nemours & Co*., 293 NLRB 896, 897 (1988)("*Dupont*"). Instead, the "Board will defer unfair labor practice allegations to the arbitral process as long as it is reasonable to anticipate that resolution of the contract dispute would also resolve the unfair labor practice dispute." *Id.* And while this evidence may be found from the express contract language, it may also be found from the parties' conduct in prior similar disputes. *See DuPont, 2*93 NLRB at 897.

In *Dupont,* for instance, the Board found deferrable a case involving the employer's alleged unlawful assignment of bargaining-unit work, despite the absence of specific contractual language covering this issue. *Id.* at 897. The Board based this conclusion on the fact that, previously, a dispute arose over the subject of unit employees doing nonunit work on computers, and in that instance, the union grieved the issue and requested arbitration. *Id.* This conduct constitutes sufficient evidence that "the [union] and [employer] both consider issues regarding work assignment to be subject to the grievance-arbitration process, [even in] the absence of specific contract[] language." *Id.* Moreover, the Board noted, "arbitrators frequently find that customs and past practices may become part of the 'law of the shop' and thus enforceable through arbitration, even if they are not a part of the written contract, and the Supreme Court

has recognized arbitrators' authority to do so." Accordingly, deferral was appropriate. *Id.*

Similarly here, the General Counsel argues that because the Agreement only mentions discharge—and not other forms of discipline—the dispute is not clearly encompassed by the Agreement's arbitration clause. But as previously explained, it is uncontroverted that the parties routinely process ***both*** discharge and non-discharge discipline through the grievance-arbitration procedure. *See* Motion at 6-7. Given this undisputed practice, the General Counsel cannot now argue that such discipline is not encompassed by the Agreement. *Id.* at 897; *see also Clarkson Industries,* 312 NLRB 349 (1993) (Board deferred a subcontracting allegation where the union had filed a grievance over that specific issue, thereby demonstrating that both parties considered the issue covered by the contractual grievance-arbitration procedure).

For this additional reason, B&W respectfully submits that its Motion should be granted and the case deferred to the parties' grievance-arbitration procedure.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing Respondent's Reply to the Reply of the General Counsel in Opposition to Respondent's Motion to Dismiss the Complaint and Notice to Show Cause was served upon the following, via e-mail, this 31st day of March, 2015:

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